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# MICHIGAN LAW REVIEW

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## THE ILLINOIS TEN-HOUR LABOR LAW FOR WOMEN.

THERE are few cases before the American courts to-day which are of more significance than that which has recently been brought in the Illinois courts by William E. Ritchie of Chicago and which seeks to enjoin the prosecuting officers of the state from enforcing the provisions of the so-called Womens' Ten-Hour Labor Law. The case of course involves the somewhat mooted question as to whether the remedy in such cases, if remedy there be at all, is by injunction, or whether the slower and more unsatisfactory procedure of a writ of error is not technically demanded, but this question is merely one of detail and is by no means fundamental. The real importance of the case lies in the fact that in it the supreme court of Illinois will be called upon to review a prior decision which was handed down some fourteen years ago in the case of *Ritchie v. People*,<sup>1</sup> and in the light of present day experience and of all of the investigation and research which has been crowded into the years following this decision, to pass definitely upon the question as to whether or not the pressure of the modern industrial system is such and the importance of the welfare of the individual woman to the state is so well recognized, as to justify the legislature in interfering in the industrial conflict and exercising a guardianship over her. It will be a decision which will be rendered in a state which is preëminently industrial but at the same time typically American in its social and political structure. Illinois is a state of homesteads and of farms. It is the state of Abraham Lincoln. But at the same time it is a state of a vast commercial development and manufacturing activity. It has within its borders and almost

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<sup>1</sup> 155 Ill. 98, 40 N. E. 454. In this case an eight-hour labor law for women was held to be invalid.

controlling its destiny the city of Chicago, a city in which the east and the west meet, a city in which, perhaps of all other American cities, the great social problems of the age are to be fought out and settled; a city in which is to be found the enterprise of the west and the conservatism of the east; the poverty and destitution of the newly arrived emigrant and the vested interest and capital of the native-born; the idealism of the church and of the college and the materialism of the marts of trade; the throbbing, pulsating American idea of universal equality and of equal opportunity and a discontent and poverty and destitution hardly surpassed in any other city of the world. Chicago is a city of all social and economic creeds—it is the melting pot of America.

The former case of *Ritchie v. the People*, though a seemingly insurmountable obstacle in the path of the present law, and though seemingly conclusive of the present controversy, is not really so in fact or in reason. It is true that in it the Supreme Court of Illinois declared invalid a statute of the state which limited the hours of labor which could be exacted of adult women in factories and workshops to eight hours a day, and held that the same was a violation of the rights of both the employer and the employee, a deprivation of property and liberty and of the equal protection of the laws as regarded both classes, and a species of class legislation which was not warranted or justified. But the case was decided at a time when the question was a new one, at a time when an unthinking and unscientific individualism was rampant in America, at a time when there was only one adjudicated case to be found in the reports on the particular question,<sup>2</sup> and when there was a paucity of scientific investigation and research upon the subject. Practically all of the large amount of really useful and scientific investigation, indeed, which has been done on the subject of the employment of women and the effect of such employment upon their health and lives and on the health and lives of their children, has been done since the year of 1894 in which the former so-called Ritchie case was argued.<sup>3</sup>

<sup>2</sup> Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383.

<sup>3</sup> See Report of Select Committee on Shops Early Closing Bill, British House of Commons, 1895; Report of Committee on Early Closing of Shops Bill, British House of Lords, 1901; Report of the Nebraska Bureau of Labor and Industrial Statistics, 1901-1902; Hygiene of Occupations, By Dr. Theodore Weyl. Jena, 1894; Travail de Nuit des Femmes dans l'industrie. Prof. Etienne Bauer. Jena, 1903; History of Factory Legislation. Hutchins and Harrison. 1903; Report of the British Chief Inspector of Factories and Workshops, 1903, on the Thirteenth International Congress of Hygiene and Demography: Effects of the Factory System. By Allen Clarke. London, 1899; Report of the United States Industrial Commission, 1900; Report of the United States Industrial Commission, 1901; Dangerous Trades. By Thomas Oliver, M. A., M. D., F. R. C. P., Medical Expert on the White Lead, Dangerous Trades,

Anyway there is nothing that is sacred in the doctrine of *stare decisis*. Society must grow and develop, become wiser, more enlightened, cultured and humane, and no procrustean bed of precedent should or will in the long run be allowed to retard its advance. The constitutions, state and national, were made for man and not man for the constitutions. Much less is man made for any technical construction thereof. And, after all, the whole question involved in a ten-hour labor case is one which is social and medical and industrial rather than legal. We nearly all now concede that if any employment or business be injurious to the public as a whole that employment may be regulated by the legislatures. We nearly all subscribe to the doctrine that the public welfare is the highest law. So, too,

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Pottery, and Lucifer Match Committees of the Home Office. London, 1902: The Working Hours of Female Factory Hands. From the Reports of Factory Inspectors, collated in the Imperial Home Office. Berlin, 1905: Report of the British Chief Inspector of Factories and Workshops, 1893 & 1898: Report of Select Committee on Shops Early Closing Bill, British House of Commons, 1895: Reports from Committee on Early Closing of Shops, British House of Lords, 1901, Vol. VI: Report of British Chief Inspectors of Factories and Workshops, 1903, T. M. Legge, H. M. Medical Inspector of Factories and Workshops: Journal of Royal Sanitary Institute, Vol XXV. M. G. Bondfield, London, 1904: From the Reports of Factory Inspectors. Collated in the Imperial Home Office, Berlin, 1905. The Working Hours of Female Factory Hands: Report of the British Chief Inspector of Factories and Workshops, 1906. Appendix II. Report on Tobacco, Cigars and Cigarette Industry: From Reports by the District Inspectors (of France) upon the Question of Night Work (Paris, 1900). By M. Legard, Inspecteur Divisionnaire de la 10e circonscription a Marseille: Age and Sex in Occupations. Twentieth Century Practice of Medicine, 1895, Vol. III. By Dr. James H. Lloyd: Journal of the American Medical Association, May 19, 1906. Fatigue. By Dr. Frederick S. Lee, Prof. Physiology, Columbia University, N. Y.: Report of Select Committee on Shops Early Closing Bill. British House of Commons, 1895: Report of the New Jersey Bureau of Statistics of Labor and Industries, 1902: Infant Mortality: A Social Problem. Geo. Newman, M. D., London, 1906: Report of German Imperial Factory Inspectors, 1895. The Case for the Factory Acts. Edited by Mrs. Sidney Webb. London, 1901: Dangerous Trades. Thomas Oliver, M. D. London, 1902: Report of the British Chief Inspector of Factories and Workshops, 1902: Report of the British Association for the Advancement of Science: the Economic Effect of Legislation Regulating Women's Labor, 1902: Report of the New York Bureau of Labor Statistics, 1900. Hygiene of Occupations. Dr. Theodore Weyl. Jena, 1904: The Working Hours of Female Factory Hands. From reports of the Factory Inspectors collated by the Imperial Home Office. Berlin, 1905: President Roosevelt's Annual Message delivered to Second Session 59th Congress. December 4, 1906. Legislative Control of Women's Work. By S. P. Breckinbridge, Journal of Political Economy. Vol. XIV. 1906: Physical and Medical Aspects of Labor and Industry. By J. L. Hoffman. Annals of Amer. Academy of Political and Social Science. Vol. XXVII. May, 1906: Labor Laws for Women in Germany. Dr. Alice Salomon. Published by the Women's Industrial Council. London, 1907: Report of the Maryland Bureau of Industrial Statistics, 1896: Report of the United States Industrial Commission, 1901: Report of the Wisconsin Bureau of Labor Statistics, 1903-1904: The Working Hours of Female Factory Hands. From Reports of the Factory Inspectors, Collated by the Imperial Home Office. Berlin, 1905: Infant Mortality. A Social Problem. George Newman, M. D. London, 1906: Industrial Conference \* \* \* of the National Civic Federation, New York, 1902: Report of the New York Bureau of Labor Statistics, 1900: The Working Hours of the Female Factory Hands. From

the enlightened thought of America to-day undoubtedly upholds the proposition that the individual wage earner is an important part of that public, and to use the language of the Supreme Court of the United States that "when the individual health, safety and welfare are sacrificed or neglected, the state must suffer."<sup>4</sup> And if these things be true the only question at issue in the case is whether or not the health and welfare, not of the particular women before the court, but of the women workers of Illinois generally who are affected by the law, demand this measure of legislative protection and relief. And whether, though we concede that organized industry and all industrial advances must bring in their wake some dangers and some disadvantages and some sacrifices, the benefit to the community and the state derived from the employment of women for ex-

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reports of the Factory Inspectors collated by the Imperial Home Office. Berlin, 1905: Report of the Illinois Chief Inspector of Factories, 1895: French Review of Hygiene and Sanitary Police. Vol. XVIII. 1896. Report of the New York Bureau of Labor Statistics, 1900: Night-work of Women in Industry. Prof. Etienne Bauer. Jena, 1903: Report of the Wisconsin Bureau of Labor Statistics, 1903-1904: Report of the United States Industrial Commission, 1900: Report of the German Imperial Factory Inspectors, 1893 & 1895: Report of the Connecticut Bureau of Labor Statistics, 1893: Report of the German Imperial Factory Inspectors, 1895 & 1898: Factory People and their Employers. By E. L. Shuey. New York, 1900: Report of the New York Bureau of Labor, 1901: Bulletin of the French Labor Office, 1903: Report of the British Chief Inspector of Factories and Workshops, 1893: Women in the Printing Trades. Edited by J. R. MacDonald, London, 1904: Report of the British Chief Inspector of Factories and Workshops, 1900, 1901 & 1902: Report of the British Association for the Advancement of Science, 1902 & 1903: History of Factory Legislation. Hutchins and Harrison, 1903: Woman in Industry. R. Gonnard. Paris, 1905: Women's Work and Wages. By Edward Cadbury. London, 1906: Report of the New York Department of Factory Inspection, 18 Report of the Commission Supérieure du Travail. Paris, 1897: Report of the California Bureau of Labor Statistics, 1904: The Working Hours of Female Factory-hands. From the Reports of Factory Inspectors, collated in the Imperial Home Office. Published by Von Decker. Berlin, 1905: Report of the Washington Bureau of Labor Statistics, 1905-1906: United Industrial Commission, 1900.

<sup>4</sup> See opinion of Brown, J., in *Holden v. Hardy*, 169 U. S. 366. We say nearly all, because the Supreme Courts of Colorado and of Illinois have in their former decisions announced a strange doctrine of social classification, a peculiar and undemocratic concept as to who, and who do not, compose the "general public," and a doctrine which reflects rather the social theories of the reign of Richard II. than those of the present day. In its opinion rendered in the case of *In Re Morgan*, 26 Colo. 415, 58 Pac. 1071, 1072, the Colorado Court says: "While invoking as a warrant for this act that phase of the police power extending to the public health, its supporters do not claim that its real and primary object is to protect the public health, or the health of that portion of the community in the immediate vicinity, or affected by the operation, of smelters. If that purpose is present at all, it is only so inferentially, and the means employed to secure it are neither adequate nor appropriate. The smelting of ores is a continuous process, night and day, the year through. It is not claimed that the business is injurious to public health. It would be absurd to argue that, while the process itself is continuous, limiting the hours of those laboring in a smelter in any wise conduces to preserve the health of any portion of the public. That is to say, three shifts of laborers, working eight hours each, would affect the public health to the same extent, if at all, as would two shifts at twelve hours each. It is not contended that the business of smelting is unlawful; nor is it claimed that the act was passed to prevent em-

cessive hours, if industrial benefit there be, compensates in happiness and all that goes to make up civilization, for the loss sustained by the community in the debilitated lives, both of the women themselves and of their children. These are questions of fact and of public policy, and they should only be determined after the fullest investigation and in the light of the industrial and physical facts of to-day as interpreted by the knowledge and the conscience of to-day. It is no light matter indeed for a court of nine men, who are more or less removed from the industrial world and the industrial conflict, and who can pass upon the case merely as it is presented to them in the arguments of counsel and in the printed record, to superimpose their opinion of public necessity and of public policy upon that of the legislative body. It is to be remembered that the legislature is representative, that its members come from every walk of life,

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ployers from perpetrating fraud upon employees or to protect the latter from trespasses. Indeed, the only object that can rationally be claimed for it is the preservation of the health of those working in smelters. Were the object of the act to protect the public health, and its provisions reasonably appropriate to that end, it might be sustained; for in such a case even the constitutional right of contract may be reasonably limited. But the act before us is not of that character. In selecting a subject for the exercise of the police power, the legislature must keep within its true scope. The reason for the existence of the power rests upon the theory that one must so use his own as not to injure others, and so as not to interfere with or injure the public health, safety, morals, or general welfare. How can one be said injuriously to affect others, or interfere with these great objects, by doing an act which confessedly visits its consequences on himself alone? And how can an alleged law, that purports to be the result of an exercise of the police power, be such in reality, when it has for its only object, not the protection of others, or the public health, safety, morals, or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it, and him only? The maxim does not read, "So use your own right or property as not to injure yourself or your own property." Perceiving the inconsistency that must follow an attempt to vindicate a law on the principle that underlies the police power, counsel adroitly invoke the maxim, "*Salus populi suprema est lex.*" So far as we can ascertain, no commentator and no judge has ever sought to borrow this wholesome maxim and use it as a prop to uphold a law whose object is to protect a man against himself. The welfare of the people is indeed the supreme law, but this maxim cannot be twisted to sustain a law violating private right which contemplates the promotion of the welfare of less than the entire people. Our bill of rights expressly says that government is instituted solely for the good of the whole." While in the so-called "former Ritchie case" the Supreme Court of Illinois quoted with seeming approval the language of Professor Tiedeman when in his work on Limitations of The Police Power, he says: "In so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons, there can be no doubt as to the constitutionality of any statute which prohibits their prosecution of that trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them. \* \* \* There can be no more justification for the prohibition of the prosecution of certain callings by women because the employment will prove hurtful to themselves, than it would be for the state to prohibit men from working in the manufacture of white lead because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron smelting works, because the lives of the men so engaged are materially shortened." § 86.

that they have the opportunities to appoint committees, to investigate and to learn, and it is also to be remembered that the social necessity of limiting the hours of labor of adult women in the factories, laundries and mines of Illinois has been recognized in the fact that the people's representatives in the legislature have twice sought to do so.<sup>5</sup> The jury, in short, has passed upon the question of fact, and in constitutional cases of this kind questions of fact and of fact alone are all that are usually to be determined. The legal question, which is merely whether the police power of the state extends to the regulation of the hours of employment where that regulation is necessary to the preservation of the public health, the public intelligence and the public morality, has been settled so often in the affirmative that it is no longer open to discussion.

We say that the question of health and necessity is the only real question involved in the present case because we believe that the other objections made by the Illinois Court to the old eight-hour

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<sup>5</sup> On this phase of the subject, the Supreme Court of Nebraska, in the case of *Wenham v. State*, 65 Neb. 394, 91 N. W. Rep. 421, in passing upon a similar statute, says: "The members of the legislature come from no particular class. They are elected from every vocation and from all the walks of life. They have observed the conditions with which they are surrounded, and know from experience what laws are necessary to be enacted for the welfare of the communities in which they reside. They determined that the law in question was necessary for the public good, and the protection of the health and well-being of women engaged in labor in the establishments mentioned in the act. That question was exclusively within their power and jurisdiction, and their action should not be interfered with by the courts unless their power has been improperly and oppressively exercised. Women and children have always, to a certain extent, been wards of the state. Women in recent years have been partly emancipated from their common law disabilities. They now have a limited right to contract. They may own property real and personal in their own right, and may engage in business on their own account. But they have no voice in the enactment of the laws by which they are governed, and can take no part in municipal affairs. They are unable, by reason of their physical limitations to endure the same hours of exhaustive labor, as may be endured by adult males. Certain kinds of work which may be performed by men without injury to their health, would wreck the constitutions and destroy the health of women and render them incapable of bearing their share of the burdens of the family and the home. The state must be accorded the right to guard and protect women, as a class, against such a condition; and the law in question, to that extent, conserves the public health and welfare. On the question of the right to contract we may well declare a law unconstitutional which interferes or abridges the right of adult males to contract with each other in any of the business affairs or vocations of life. The employer and the laborer are practically on an equal footing, but these observations do not apply to women and children. Of the many vocations in this country, comparatively few are open to women. Their field of remunerative labor is restricted. Competition for places therein is necessarily great. The desire for place, and in many instances, the necessity of obtaining employment, would subject them to hardships and exactions which they would not otherwise endure. The employer who seeks to obtain the most hours of labor for the least wages has such an advantage over them that the wisdom of the law for their protection, cannot well be questioned. No doubt these considerations were the moving cause for the passage of the law in question. If the act is the result of a fair, reasonable exercise of police power, it should be upheld."

law are absolutely untenable and are at variance not only with the current of American judicial opinion, but with that even of Illinois itself. When in the former case, indeed, the court held that the act was subject to the charge of class legislation because it discriminated between men and women, and between the woman working in the factory and the woman working in the kitchen, in the office or on the farm, it sought to create an idea of class legislation which is absolutely untenable and absurd, and to which it, itself, has never consistently adhered.<sup>6</sup>

Classification is not necessarily class legislation, nor can the persons affected always complain that they are not afforded the equal protection of the laws. If this were so, then nearly all of our legislation would come within the ban and there would be an end to social progress. There must be a beginning somewhere, and the fact that an act is not omnibus is by no means fatal.<sup>7</sup>

It was certainly never a principle of the common law that the courts should be deemed powerless to order the suppression or abatement of one nuisance merely because another remained uncontrolled, nor can it with reason be contended that it was the intention of the framers of our several constitutions that the legislatures should be precluded from prohibiting the doing of certain injurious acts, merely because they had not happened to legislate against all things injurious. It is certainly true that there can in the main be but one due process of law, and that that due process of law implies "a general law, a law which hears before it condemns, which proceeds upon inquiry, which renders judgment only after trial."<sup>8</sup> And it is also equally true that class legislation in the form of special privileges was never sanctioned. The desire for fair and impartial trials however, and the prejudice against the class privileges and monopolies which existed in England and in America prior to the American Revolution should never in reason be allowed to go so far as to prevent proper police control and regulation where no privileges are sought to be conferred but public injury merely prevented. Strangely enough, however, the Illinois court, in its labor decisions, but in none others, seems to have arrived at a contrary conclusion. In passing upon the constitutionality of the eight-hour statute to which we have referred and which prohibited the employment of females in factories and work-shops for more than eight hours in any one day, it said:<sup>9</sup> "We are inclined to regard the act as one

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<sup>6</sup> See *Hawthorn v. People*, 109 Ill. 311.

<sup>7</sup> *Waite, C. J., in Chicago, B. & Q. Ry. Co. v. Iowa*, 94 U. S. 155.

<sup>8</sup> *Daniel Webster's Argument in Dartmouth College Case.*

<sup>9</sup> See former case of *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454.

which is partial and discriminating in its character. If it be construed as applying only to manufacturers of clothing, wearing apparel and articles of a similar nature, we can see no reasonable ground for prohibiting such manufacturers and their employees from contracting for more than eight hours of work in one day, while other manufacturers and their employees are not forbidden to so contract. If the act be construed as applying to manufacturers of all kinds of products, there is no good reason why the prohibition should be directed against manufacturers and their employees and not against merchants or builders, or contractors or carriers, or farmers or persons engaged in other branches of industry, and their employees therein. Women employed by manufacturers are forbidden by section 5 to make contracts to labor longer than eight hours in a day, while women employed as saleswomen in stores, or as domestic servants, or as bookkeepers or stenographers or typewriters, or in laundries or in other occupations not embraced under the head of manufacturing, are at liberty to contract for as many hours of labor in a day as they choose. The manner in which this section thus discriminates against one class of employers and employees and in favor of all others, places it in opposition to the constitutional guaranties hereinbefore discussed and so renders it invalid." In like manner the supreme court of Nebraska<sup>10</sup> held an eight-hour labor day for men invalid because it excepted from its provisions persons engaged in farm or domestic labor,<sup>11</sup> while the supreme court of Colorado<sup>12</sup> held it incompetent for the legislature to single out the workmen in underground mines and smelters and to restrict them as to the number of hours they should work, or their employers as to the number of hours they should exact of them, as against employers and employees in other lines of industry.

The logic of these decisions practically is that all legislation except that which is "omnibus" in its character is unconstitutional, and in arriving at them the courts seem to have been guilty of a lack of discrimination which is somewhat remarkable. We can accept their premises in every case, but must differ materially from their conclusions and from their application of the principles involved. When the supreme court of Illinois says that "the law of the land is the opposite of arbitrary, unequal and partial legislation"; that "the legislature has no right to deprive one class of persons of priv-

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<sup>10</sup> *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. W. 362.

<sup>11</sup> Though the same court later on in the case of *Wenham v. State*, 65 Neb. 394, 91 N. W. 421, to which we will afterwards refer, sustained an eight-hour law for women in certain limited industries.

<sup>12</sup> *In re Morgan*, 26 Colo. 415, 58 Pac. 1071.

ileges allowed to other persons under *like conditions*"; that "the man who is forbidden to acquire and enjoy property in the same manner in which the rest of the community is permitted to acquire and enjoy it is deprived of liberty in matters of primary importance to his pursuit of happiness"; that "if one man is denied the right to contract as he has hitherto done under the law and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of the right,"<sup>13</sup> we must in the main yield a ready assent. It is incumbent upon us however to use words understandingly, to understand the premises thus laid down, and to determine when a law is and when it is not "arbitrary and unequal," what are "like conditions" and when men may be said to be acquiring property "in the same manner." And is not the test of class legislation after all, whether or not by that legislation any person is hindered in his struggle or competition with his fellow men, and not whether the rules which are adopted to regulate his particular trade or calling are made applicable to trades and callings with which he has no concern? Is not this all that the term "equal protection of the laws" implies?

There is for instance, no competition between the woman working on the farm and the woman in the office, or between the woman in the factory, nor even between the women working in different kinds of factories or workshops, nor is there any competition between the manufacturer and the farmer or the merchant and the lawyer. No regulation then of the class may be necessary, and if not necessary, it is a deprivation of property without reason based upon the public welfare, which is nothing more or less than a deprivation of property without the process of law, and a denial of the equal protection of the laws.<sup>14</sup> If, however, it is necessary and is wise in its nature, the legislation which imposes it should not be nullified merely because it is not broad enough to include the whole of organized society. The inquiry should be, is it wise, is it necessary, does it include all competing with one another in the particular trade, business, or calling, not whether other independent callings are similarly regulated and controlled. A beginning for all police legislation must be made somewhere, and that somewhere, is where the exigency is made manifest to the legislatures. Regulations may also be needed elsewhere, but that need does not necessarily negative the necessity for the regulation in the place where it is afforded.<sup>15</sup> In speaking

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<sup>13</sup> See opinion of Court in *Ritchie v. People*, *supra*.

<sup>14</sup> The cases on this point are too numerous to need citation.

<sup>15</sup> See opinion in *People v. Smith*, 108 Mich. 527, 66 N. W. 382; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539.

of a co-employee act made applicable to railroads merely, Mr. JUSTICE FIELD of the Supreme Court of the United States, expressed the correct theory when he said: "It meets a particular necessity and all railroad corporations are without distinction, made subject to the same liabilities. As said by the court below it is simply a question of legal discretion, whether the same liability shall be applied to carriers by canal and stage coaches, and to persons and corporations using steam in manufacturies."<sup>16</sup>

The sole and only question in the case, then, is whether the statute is reasonable and reasonably necessary, and this must be determined in the light of modern research and of the modern industrial conscience.

The argument put forth in the former case, and which has been adroitly injected into the present case by inducing some of the factory girls to themselves join as party plaintiffs, that the act is an unreasonable and unconstitutional restriction upon the liberty and freedom of contract of the employee as well as of the employer, is well answered by the Supreme Court of the United States when in the case of *Holden v. Hardy*,<sup>17</sup> it says: "It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer." And again when later in the same case, it says:

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as

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<sup>16</sup> *Missouri Pacific Railway Co. v. Mackey*, 127 U. S. 205, 210.

<sup>17</sup> 169 U. S. 366.

possible from their employees, while the latter are often induced by the fear of discharge, to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

There is in fact under our highly organized industrial system no real and entire liberty of contract and in our manufacturing and industrial centers no contractual equality. The laboring man, or woman, or girl, must there at any rate take largely what he can get. There is indeed, no such thing in America as a scarcity of labor at a living wage. It is true that there is occasionally an apparent scarcity in the wheat fields of the Northwest during harvest time, but this is only for a limited time and is only so at all because the maximum wage is at the most from two to three dollars a day for often fourteen or fifteen hours' work and the harvest season is less than two-months in length. There is absolutely no employment offered to the agricultural labor in these sections during the winter months or during the remainder of the year. There can therefore be no home supply of labor and the railroad fare of the outsiders eats up practically all of the profits of their enterprise.

The judicial history of the so-called ten or eight-hour labor movement for women in the United States has been as follows: Up to the year 1876 there was no adjudicated case upon the subject, nor mention of the subject to be found anywhere in the reports or in the law books. In that year the question was passed upon by the supreme court of Massachusetts in the case of *Commonwealth v. Hamilton Manufacturing Company*<sup>18</sup> and a statute was sustained which provided that no minor under the age of eighteen years and no female over that age, should be employed in any manufacturing establishment within the Commonwealth of Massachusetts for more than ten hours in any one day. The opinion in the case, however, was extremely weak and unscientific and must have been, and always will be, a disappointment to the advocates of this kind of legislation. Its reasoning was unsatisfactory and inconclusive and no attempt was made to get at fundamentals. In it the court dismissed the question at issue by stating generally and broadly that the act came within the police power of the state, and made the peculiar assertion that the right of a woman to use her own judgment as to the number of hours she should work, was not interfered with, as the statute

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<sup>18</sup> 120 Mass. 383.

merely applied to work in factories, and after the factory was closed, or she had left the same, she could work at any other occupation she chose.

The objections raised to the class of statutes in question, and which were, no doubt, urged in the Massachusetts case, are that they are class legislation; that they discriminate between man and woman; that they deprive both the employer and the employee of property and liberty without due process of law; that they needlessly interfere with personal liberty and the freedom of contract. There can be no doubt that the right to property and the liberty guaranteed by the constitution involves the right not only to possess that which has already been acquired and that which is existing and tangible, but also to labor for the acquisition of property, and, for this end, to make and enter into the necessary contracts of employment.<sup>19</sup> It is absurd, therefore, to say that a woman prohibited from laboring in a factory for more than a certain number of hours a day cannot complain, for the reason that she may spend her hours outside of such factory in any manner that she pleases. The fact still remains that she is restricted in following her trade, her peculiar employment, the employment at which she is, perhaps, alone able to earn her daily bread. The question must and should be met squarely. She is deprived of property, or, what is the same thing, of the right to acquire property, and so is her employer. The law, therefore is invalid unless some valid justification for it exists in the public weal, and in the broad considerations of public policy, subject to which all rights of property and of individual liberty exist. Is the right of property, then, and the individual liberty of which she and her employer have been deprived, a right and a liberty, the exercise of which is injurious to the body politic, and which, therefore, should be restrained, for "the welfare of the people is the highest law?"

In 1894 the supreme court of Illinois<sup>20</sup> answered this question in the negative, in passing upon the validity of a statute similar in all respects to that of Massachusetts, except that an eight-hour day instead of a ten-hour one was provided for. The act was held unconstitutional on the ground that it was an unjustifiable interference

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<sup>19</sup> See opinion in *Braceville Coal Co. v. People*, 147 Ill. 66, 70.

<sup>20</sup> In what may be called the first case of *Ritchie v. People*, 155 Ill. 98. Between 1876 and 1894, there were no adjudicated cases on the subject and no reference made to it by the text writers, except by Judge Cooley, Parker and Worthington, and Professor Tiedeman. Of these writers, the two former authorities expressed a belief in the validity of such legislation, and based their belief on the case of *Hamilton Mfg. Co. v. People*, *Supra*. Professor Tiedeman, on the other hand, took a contrary view. See Cooley Const. Lim. p. 745; Parker and Worthington on Public Health and Safety, § 260; Tiedeman on Limitations of Police Powers, § 178.

with personal liberty, was class legislation, and deprived both the women concerned and their employers of property without due process of law. "Women employed by manufacturers," the court said, "are forbidden to make contracts to labor longer than eight hours a day, while women employed as saleswomen in stores, or as domestic servants or as bookkeepers or stenographers or typewriters, or in laundries or other occupations not embraced under the head of manufacturing, are at liberty to contract for as many hours of labor in a day as they choose. The manner in which the section thus discriminates against one class of employers and employees and in favor of all others, places it in opposition to the constitutional guaranties hereinbefore discussed, and so renders it invalid. But aside from its partial and discriminating character, this enactment is a purely arbitrary restriction upon the fundamental rights of the citizen to control his or her own time and faculties. It substitutes the judgment of the legislature for the judgment of the employer and employee in a matter about which they are competent to agree with each other \* \* \* It takes away the right of private judgment. Where the legislature thus undertakes to impose an unreasonable and unnecessary burden upon any one citizen or class of citizens, it transcends the authority intrusted to it by the constitution, even though it imposes the same burden upon all other citizens or classes of citizens. General laws may be as tyrannical as partial laws \* \* \* As a 'citizen,' woman has the right to acquire and possess property of every kind. As a 'person,' she has the right to claim the benefit of the constitutional provision that she shall not be deprived of life, liberty or property without due process of law. Involved in these rights thus guaranteed to her is the right to make and enforce contracts. The law accords to her, as to every other citizen, the right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions and other vocations. \* \* \* As a general thing it is the province of the legislature to determine what regulations are necessary to protect the public health and secure the public safety and welfare. But inasmuch as sex is no bar under the constitution and the law, to the endowment of woman with the fundamental and inalienable rights of liberty and property, which include the right to make her own contracts, the mere fact of sex will not justify the legislature in putting forth the police power of the state for the purpose of limiting her exercise of those rights, unless the courts are able to see that there is some fair, just and reasonable connection between such limitation and the public health, safety or welfare proposed to be secured by it. \* \* \* The act is

not based upon the theory that the manufacture of clothing, wearing apparel and other articles, is an improper occupation for women to be engaged in. It does not inhibit their employment in factories and work-shops. On the contrary, it recognizes such places as proper for them to work in by permitting their labor therein during eight hours of each day. The question here is not whether a particular employment is a proper one for the use of female labor, but the question is whether in an employment which is conceded to be lawful in itself, and suitable for women to engage in, she shall be deprived of the right to determine for herself how many hours she can and may work during each day. There is no reasonable ground, at least none which has been made manifest to us, in the argument for fixing upon eight hours in one day as the limit within which woman may work without injury to her physique, and beyond which, if she work, injury will necessarily follow. But the police power of the state can only be permitted to limit or abridge such a fundamental right as the right to make contracts when the exercise of such power is necessary to promote the health, comfort, welfare or safety of society or the public; and it is questionable whether it can be exercised to prevent injury to the individual engaged in a particular calling."

In July, 1902, however, the supreme court of Nebraska in an unanimous opinion<sup>21</sup> sustained an almost identical statute. The act passed upon forbade the employment of females for more than sixty hours in any one week, or ten hours in any one day in any manufacturing, mechanical or mercantile establishment, hotel or restaurant. It differed merely from the Illinois statute in that the hours of labor provided for were ten instead of eight, and that the act applied to hotels and restaurants as well as to factories and work-shops. In its opinion, however, the court took a directly opposite position to that assumed by the Illinois tribunal. It resolved the question propounded by the latter court, as to whether the police power or the state could be invoked "to prevent injury to the individual engaged in a particular calling," irrespective of any direct proof of an injury to the public at large, in the affirmative. It evinced a willingness to yield to the legislative discretion in matters of the kind passed upon. It clearly recognized woman as belonging to a class of her own, as being basically different from man, as a ward of the state and peculiarly the subject of its care and solicitude. The members of the legislature, the court said, "come from no particular class. They are elected from every portion of the state, and come from every voca-

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<sup>21</sup> *Wenham v. State*, 65 Neb. 394, 91 N. W. 421.

tion and from all the walks of life. They have observed the conditions with which they are surrounded, and know from experience what laws are necessary to be enacted for the welfare of the communities in which they reside. They determined that the law in question was necessary for the public good, and the protection of the health and well-being of women engaged in labor in the establishments mentioned in the act. That question was exclusively within their power and jurisdiction, and their action should not be interfered with by the courts unless their power has been improperly and oppressively exercised. Women and children have always, to a certain extent, been wards of the state. Women in recent years have been partly emancipated from their common law disabilities. They now have a limited right to contract. They may own property real and personal in their own right, and may engage in business on their own account. But they have no voice in the enactment of the laws by which they are governed, and can take no part in municipal affairs. They are unable, by reason of their physical limitations, to endure the same hours of exhaustive labor, as may be endured by adult males. Certain kinds of work which may be performed by men without injury to their health, would wreck the constitutions and destroy the health of women and render them incapable of bearing their share of the burdens of the family and the home. The state must be accorded the right to guard and protect women, as a class, against such a condition; and the law in question, to that extent, conserves the public health and welfare. On the question of the right to contract, we may well declare a law unconstitutional which interferes or abridges the right of adult males to contract with each other in any of the business affairs or vocations of life. The employer and the laborer are practically on an equal footing, but these observations do not apply to women and children. Of the many vocations in this country, comparatively few are open to women. Their field of remunerative labor is restricted. Competition for places therein is necessarily great. The desire for place, and in many instances, the necessity of obtaining employment, would subject them to hardships and exactions which they would not otherwise endure. The employer who seeks to obtain the most hours of labor for the least wages has such an advantage over them that the wisdom of the law for their protection cannot well be questioned.<sup>22</sup> No doubt these considerations were the moving cause for the pass-

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<sup>22</sup> We may even question if the women who have been induced to join as co-complainants in the Ritchie case, really do so willingly and really understand the import of their act. We wonder if the idea of bringing the suit first originated with them.

age of the law in question. If the act is the result of a fair, reasonable exercise of police power, it should be upheld."

This case was followed in the month of September of the same year by a decision of the supreme court of Washington,<sup>23</sup> which, on much the same grounds, and by the same line of reasoning, sustained a statute which provided that no female should be employed in any mechanical or mercantile establishment, laundry, hotel and restaurant in the state.

And at about the same time (in 1896 and 1899), the supreme court of Utah in the cases of *State v. Holden* and *Short v. Mining Co.*,<sup>24</sup> sustained the validity of state legislative enactments which made it unlawful to employ men in smelters and underground mines for more than eight hours in any one day, and the supreme court of the nation by sustaining these decisions and by approving both their reasoning and conclusions, seemed to settle for all time and in the affirmative, the validity of statutes of the kind in question in so far as the Federal Constitution was concerned.<sup>25</sup> The opinion rendered in the latter court in these cases was not a surprise to the careful and studious lawyer, as the court has, except where interstate commerce has been concerned and the federal prerogatives directly affected, always adopted a *laissez faire* attitude in regard to matters of local home rule and of state police control.<sup>26</sup> It is noticeable, however, in that it recognizes a large independence on the part of the legislatures of the states as opposed to the courts, recognizes a possible contractual inequality as between the employer and the employee and recognizes the undoubted right of the state, if such be the case, to interfere for the protection of the weaker party and for the protection of the state itself. At the same time it repudiates with scorn the proposition that the legislature has no right to interfere with the contract of employment, and that if the employee chooses to enter into a contract which is injurious to his health and is dangerous to his life, it is none of the state's business and is a matter in which the state can have no concern. "The conditions with respect to the health of laborers in underground mines," the court says,<sup>27</sup> "doubtless differ from those in which they labor in smelters and other reduction works on the surface. It may be said that labor in such conditions must be performed. Granting that, the period of labor each

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<sup>23</sup> *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52; *Com. v. Beatty*, 15 Pa. Super. Ct. 5.

<sup>24</sup> 14 Utah 71; 14 Utah 96; 20 Utah 20; 57 Pac. 720.

<sup>25</sup> See *Holden v. Hardy*, 169 U. S. 366.

<sup>26</sup> See *Holden v. Hardy*, 169 U. S. 366; *Powell v. Pennsylvania*, 127 U. S. 678; *Gundling v. Chicago*, 177 U. S. 183; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13.

<sup>27</sup> In *Holden v. Hardy*, *supra*.

day should be of reasonable length. Twelve hours per day would be less injurious than fourteen, ten than twelve, and eight than ten. The legislature has named eight. Such a period was deemed reasonable. \* \* \* No reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order, or promote the general welfare. We must resolve them in favor of the right of the department of government. \* \* \* We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. It is sufficient to say of them that they have no application to cases in which the legislature has adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class. \* \* \* Upon the principles above stated we think the act in question may be sustained as a valid exercise of the police power of the state. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and as long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts. While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting. \* \* \* The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests, are to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge, to conform to regulations which their judgment fairly exercised, would

pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. \* \* \* It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defense is not so much that his right to contract has been infringed upon, but the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract, does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. \* \* \* The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the state must suffer."<sup>28</sup>

From this position it is true there was a partial and momentary relapse in the case of *Lochner v. New York*,<sup>29</sup> in which, in 1905, the United States Supreme Court declared invalid a statute of the State of New York which limited the hours of labor of men in the bakeries of the state to sixty hours a week and ten hours a day. The position taken in this case was in principle utterly at variance with its prior decision and we believe, could have been merely the result of a brief ascendancy of Mr. JUSTICE BREWER in the councils of the court and the pushing forward of his much urged and often repeated theory that organized labor is gaining too strong a foothold in the United States, that the rights of property are being endangered, that those who own property are coming to be too much at the mercy of those that have none, and on account of the life tenure of its members, the only bulwark against that danger and that tendency is the Supreme Court of the United States.<sup>30</sup>

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<sup>28</sup> This case was followed in 1906, by the case of *State v. Livingston Concrete Bldg. & Mfg. Co.*, 34 Mont. 570, 87 Pac. 980, in which the Supreme Court of Montana sustained a statute which prohibited the employment of laborers for more than eight hours in one day on municipal, county, and state work, and in mills and smelters for the treatment of ores, and in underground mines, and in so doing, followed the reasoning and the logic of the Supreme Court of Utah and of the Supreme Court of the United States.

<sup>29</sup> 198 U. S. 45, 25 Sup. Ct. 539.

<sup>30</sup> "There are to-day ten thousand millions of dollars invested in railroad prop-

A perusal, indeed, of a long line of cases leads us to believe that until the decision of *Lochner v. New York*, the tendency of the Supreme Court of the United States had for a long period of years been to trust to the discretion of the state courts and of the state legislatures in so far as the internal affairs of the states were concerned, and interstate commerce, or the national prerogative were not affected. This tendency is especially apparent in the earlier decisions of the court and in those decisions which have been handed down since the prejudices and passions of the civil war began to abate, and the proper limits of the doctrine of state sovereignty came to be sanely and calmly discussed. In these latter decisions, indeed, the intention is clear to concede to the several states the fullest measure of home rule, and only to allow the protection of the fourteenth and fifteenth amendments to be invoked in the most extreme cases, cases where from race or class jealousy, or hatred, classes or individuals are deprived of their rights as citizens or freemen, or where oppression is resorted to. There appears to be a marked unwillingness, if not an absolute refusal, to use the amendments in question, for the purpose of nullifying laws whose unquestioned motive was the public welfare, or which, in so far as the individual is concerned,

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erty," (said Mr. Justice Brewer in an address before the New York Bar Association in 1893) "whose owners in this country number less than two million persons. Can it be that whether this immense sum shall earn a dollar, or bring the slightest recompense to those who have invested perhaps their all in that business, and are thus aiding in the development of the country, depends wholly upon the whim and greed of that great majority of sixty millions who do not own a dollar? I say that so long as constitutional guaranties lift on American soil their buttresses and bulwarks against wrong, and so long as the American judiciary breathes the free air of courage, it cannot \* \* \* What then ought to be done? My reply is, strengthen the judiciary. How? Permanent tenure of office accomplishes this \* \* \* Judges are but human. If one must soon go before the people for re-election, how loath to rule squarely against public sentiment \* \* \* To stay the wave of popular feeling, to restrain the greedy hand of the many from filching from the few that which they have honestly acquired, and to protect in every man's possession and enjoyment, be he rich or poor, that which he hath, demands a tribunal as strong as is consistent with the freedom of human action, and as free from all influences and suggestions, other than is compassed in the thought of justice, as can be created out of the infirmities of human nature. \* \* \* The black flag of anarchism flaunting destruction to property, and therefore, relapse of society to barbarism; the red flag of socialism inviting a re-distribution of property, which in order to secure the vaunted equality, must be repeated again and again, at constantly decreasing intervals, and that colorless piece of baby cloth which suggests that the state take all property and direct all the work and life of individuals, as if they were little children, may seem to fill the air with flutter. But as against these schemes or any other plot or vagary of fiend, fool or fanatic, the eager and earnest cry and protest of the Anglo-Saxon is for individual freedom and absolute protection of all his rights of person and property. \* \* \* And to help strengthen that good time we shall see in every state an independent judiciary, made as independent of all outside influences as possible, and to that end, given a permanent tenure of office and an unchangeable salary."

are protective and not spoliative.<sup>31</sup> But be this as it may, and be the attitude of the court what it may towards the ten-hour labor day for *men*, all fear of any possible hostility on the part of the Supreme Court of the United States to the ten-hour labor day for women, has been removed by the still later case of *Muller v. Oregon*,<sup>32</sup> which was decided in 1908 and in which the court in a unanimous opinion (the first unanimous opinion ever handed down by that court in a so-called labor case), sustained a statute of the state of Oregon which limited the hours of labor for women in mechanical establishments, factories and laundries, to ten hours in one day. The case is significant in that in it the court paid but little attention to technical law, nor did counsel for the state of Oregon attempt to cite many legal authorities in support of their contention, but both court and counsel seem to have treated the question as one which was economic, social, and medical, rather than legal, and to have cited the reports of commissioners, charitable bureaus and physicians and the utterances of political economists and sociologists, rather than the dicta of the courts of law. "The legislation and the opinions referred to in the margin"<sup>33</sup> the court said, "may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form, limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected

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<sup>31</sup> This was the position clearly taken in the case of *Atkin v. Kansas*, 191 U. S. 207 (decided in 1903), where the Supreme Court of the United States sustained a statute of Kansas which provided that eight hours should constitute a day's work for all laborers, employed by or in behalf of the state, or any of its municipalities, and made it unlawful for any one thereafter contracting to do any public work, to require or permit any laborer to work longer than eight hours per day in the underground mines; in the case of *Holden v. Hardy*, 169 U. S. 366, which sustained a statute of Utah forbidding the employment of laborers for more than eight hours per day in the underground mines, and in the still more extreme case of *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, in which a statute of Tennessee was sustained, which regulated the method of paying wages in the mines of that state. It is also the position which is unquestionably taken in the case of *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 176 Ill. 340; see also *Powell v. Pennsylvania*, 127 U. S. 678.

<sup>32</sup> 28 Sup. Ct. 324.

<sup>33</sup> See Notes 3 ante and 35 post.

by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge. It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the 14th Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the 14th Amendment, restrict in many respects the individual's power of contract. That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset, by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs, it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to

the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon, and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.<sup>34</sup>

It may be, then, that the Illinois statute will be held invalid by the supreme court of Illinois and that the court will rightly decide that the best interests of the state demand its repudiation, but if the court does take this position it will stand alone among the tribunals of the world in so doing. As yet, indeed, not only has no other court taken such a position, but no economist or sociologist or physician of any note has yet been found, either in Europe or in America, to claim that long hours of labor for women are even industrially profitable.<sup>35</sup> A few individual employers may no doubt profit by working

<sup>34</sup> Almost identically the same language and reasoning was used and followed by the Supreme Court of Nebraska in the case of *State v. Wenham* to which we have before referred, and the same distinction between man and woman made. See quotation in notes ante.

<sup>35</sup> See Note 3 ante. See also Report of the Maine Bureau of Industrial and Labor Statistics, 1888: Report of the Massachusetts Bureau of Labor Statistics, 1872 & 1873: Reports of Medical Commissioners on the Health of Factory Operatives. Parliamentary Papers, 1833, Vol. XXI: Factory and Workshop Act Commission, 1875. British Session Papers, 1876: Report of the Maine Bureau of Industrial and Labor Statistics, 1892: The Effect of Machinery on Wages. London, 1892: Reports of Medical Commissioners on the Health of Factory Operatives. David Barry. British Sessional Papers, 1833, Vol. XXL: Massachusetts Legislative Documents. House, 1866, No. 98: Reports of Commissioners on the Hours of Labor. Massachusetts Legislative Documents. House, 1867, No. 44: Massachusetts Bureau of Statistics of Labor. Domestic Labor and Woman's Work, 1872 & 1873: Report of the British Chief Inspector of Factories and Workshops, 1873, Vol. XIX, 1859 & 1877: Factory and

their employees to the breaking down point and then discharging them and filling their ranks with the young and strong, but the

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practice results in an economic and a social loss to the state which is incalculable. A democratic state is made up of its individual citizens and the whole cannot be greater than the sum of all of its parts. When the individual health, safety or welfare are sacrificed, the state must suffer. The experience of Great Britain in the so-called Boer War, ought to be lesson enough for any thinking people. There, out of a population of over forty million people, it was found almost impossible to raise a standing army of three hundred thousand able-bodied men. It was found impossible, because the sins and often misfortunes of fathers descend to their children to the third and fourth generations; because the iniquitous factory and mining system which prevailed at the beginning of the nineteenth century, not only wrecked the lives and the morals of the employees of that day, but the lives and the health and the morals of their offspring. It was impossible because the agrarian system of England has driven the common people from the land, exalted the partridge and the deer and the pheasant over the human soul, and crowded into the slums of the cities, the yeomen whose ancestors stood like granite walls at Crecy, at Poitiers and at Waterloo. As yet, indeed, no thoughtful man has been heard to contend that women are as strong as men, or that debilitated lives are a national asset. Nor even that reasonable hours of labor are not on the whole more profitable on account of the increased zest and hope and buoyancy and intelligence that results from them. The argument against the shorter day is based purely on a theory of a supposed property right, the supposed right of a man to do as he pleases with his own, and to contract as he pleases. But this theory has no real foundation in our legal history. Opposed to it is the maxim that the public welfare is the highest law, and the growing belief that human lives and human souls are of more value than many sparrows—than even liberty itself, for it is for them that liberty exists and property was created.

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